

ification of the terms and the manner in which the mortgaged property was directed to be sold, and that with the consent of the defendants, Joshua and William Hitch, the terms and mode of sale were changed accordingly. Now, if the ground taken by this complainant is the true one, and the decree of the 18th of January, 1841, was only designed as a security for such sum as might afterwards be found due Fenby, why should the complainant in the succeeding year have applied to the court for an alteration of the terms so as to facilitate the sale, and why, above all, should the Messrs. Hitch, by their answer in writing, have given their consent to such modification? The position now assumed is, that the decree of 1841, was a mere security for an unascertained balance; that it was not to be executed until there should be an adjustment of accounts between the parties; that no such adjustment has been made, and that when the account of Fenby is purged of the usurious charges contained in it, and other objectionable and unfounded items, the entire amount claimed by him will be extinguished. But how can this pretension be reconciled with the fact that within less than two years from the date of the decree, these parties are found concurring in an application to the court to change the terms and mode of sale so as to facilitate its execution? It appears to me, to be no very easy task to reconcile the proceedings referred to with the position now taken by the complainant in this cause, and I am clearly of opinion, he has not succeeded in maintaining the issue in fact presented by the pleadings.

Assuming then, as I do, that the complainant has failed in showing that the decree was taken as security merely for an unliquidated balance, and that he has moreover failed in proving that it is about to be used for a fraudulent or oppressive purpose, there would seem to be no ground upon which he can ask the interposition of this court to open the decree and send the parties to the Auditor for an account.

It is said, however, that conceding the complainant has not succeeded in establishing these grounds, he is yet entitled to have the decree of 1841 opened, and the amount reduced by striking from the claim of Fenby, the usurious interest with which it is alleged he charged Joshua and William Hitch.